

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LUPITA M. LOPEZ)	
Claimant)	
)	
VS.)	
)	
DEAN & DELUCA, INC.)	
Respondent)	Docket No. 1,041,720
)	
AND)	
)	
FEDERAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the June 10, 2009 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

In this docketed claim, the claimant was released at maximum medical improvement by the authorized treating physician for a back injury she had suffered in October 2007. Two days later she fell outside her home and suffered a laceration to her forehead as well as a dislocation of her right knee which required surgery. Claimant explained that as she was walking to her vehicle she experienced a sudden sharp pain from her back into her leg, which gave out, causing her to fall. Consequently, claimant argued that her fall and injuries were a natural and probable consequence of her back injury. Respondent argued that claimant's fall was the result of either the natural aging process or her normal day-to-day activities but was not a natural consequence of her underlying back injury. Respondent argued the contemporaneous medical records contained various versions of a history of claimant taking a step down a stair then falling down a five or six foot embankment but contained no mention of back pain causing her leg to give out.

The Administrative Law Judge (ALJ) found that claimant's injuries sustained in the fall on April 18, 2009, were a natural and probable consequence of her original injury on October 1, 2007. The ALJ noted the medical records conflicted with claimant's recollection of the incident but found "The court is persuaded by the testimony of claimant and her

daughter who testified that the front of their residence where claimant fell does not have a five to six foot embankment and that claimant at no time fell down an embankment.”¹

Respondent requests review of whether claimant's injuries sustained on April 18, 2009, at home arose out of and in the course of her employment with respondent as a natural and probable consequence of her original back injury on October 1, 2007, and whether claimant's accidental injury was a result of the natural aging process or normal activities of day-to-day living pursuant to K.S.A. 44-508(e). Respondent argues that claimant's fall was a normal activity of day-to-day living that is not compensable and therefore the ALJ's Order should be reversed.

Claimant argues the fall on April 18, 2009, was a natural and probable consequence of the original back injury and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant had received treatment for her back which included a series of epidural injections. It was determined that she was a nonsurgical candidate and in any event she did not want back surgery so she was released at maximum medical improvement with permanent restrictions for her back on April 16, 2009. Dr. Pat Do, her treating physician, noted that she reported that her back was doing better. The doctor further noted claimant's back symptoms would improve after the epidural injections but her symptoms would then return. Claimant testified that after her back injury she experienced episodic instances of sharp pain in her back radiating into her hip and leg. And claimant further testified that she had episodes where the pain from her back caused her leg to give out but she had not fallen before the incident on April 18, 2009.

Claimant testified that on April 18, 2009, as she walked to her vehicle to go shopping she experienced a sharp pain from her back to her right leg and her leg gave out causing her to fall. She further stated that she gave that history to the personnel at the hospital. Her daughter testified that she heard her mother give that history to the trauma personnel as they were transferring her from the family vehicle onto a gurney to transport her into the emergency room.

Claimant testified that where she fell was on a sidewalk with a small slope, that she did not fall on a step, and that she did not trip. Both claimant and her daughter testified that there was no five or six foot embankment where her mother fell and instead there was only a slight slope down from the door of their house.

¹ ALJ Order (Jun. 10, 2009) at 2.

Conversely, the medical records from Via Christi where claimant went for emergency treatment contained various versions of the accident that included “she took one step down a stair and then fell down an embankment”; “she fell from a standing position down a 5 to 6 foot embankment”; “fell from standing -- then rolled down embankment”; “fell down 1 step + embankment”; and “fell from standing position & rolled down 5-6 ft embankment”.² The medical records do not contain a history of back pain causing the leg to give out.

Dr. Pat Do examined claimant on May 11, 2009, at the request of respondent’s attorney. The purpose of the examination was to determine whether the fall and injury to claimant’s right knee was related to her back injury. Dr. Do opined that based upon the contemporaneous medical records it would be difficult to conclude the right knee injury was related to the original back injury but that if claimant’s testimony was accepted regarding back pain causing the leg to give out then it could be argued there is a causal relationship to the back injury. Dr. Do’s report provided in pertinent part:

This indeed is a very difficult [sic] to sort out. The patient had a worker compensation back injury, but was considered to be a nonsurgical candidate and was adamant about not having surgery on her back. She was placed at MMI on 04/16/09, for her back. She actually reported her back to be doing better.

In reviewing the hospital documents of the injury to her right knee, it is documented that the patient was admitted as a noninsured patient and there is no documentation from any of the documents that she was complaining of back pain. There were multiple x-rays taken as she was at level II trauma.

X-rays included the right shoulder, right elbow, right wrist, elbows, and right knee, but not back x-rays.

Based on this information that she was at MMI with improved back pain and reported no back pain when she was taken to the hospital and she actually has not been employed since 2008. It would be difficult to determine causation of the right knee related to the back injury.

However, if you believe the patient’s history that when stepping out of her house she felt a sharp pain in her back, which shot down into her right leg causing her leg to give out, then one can argue that it is causally related to her previous work related back injury.³

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury,

² P.H. Trans., Resp. Ex. 1.

³ P.H. Trans. Resp. Ex. 2.

including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁴ But where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause, it would not be compensable.⁵

Simply stated, and as noted by Dr. Do, if claimant's testimony regarding the cause for her fall is credible then her right knee injury would be causally related to her back injury and compensable. The only evidence contradicting claimant and her daughter's testimony is the history of injury contained in the medical records. And none of those records contain any reference to back pain causing claimant's leg to give out. Claimant argues that an initial incorrect record was then repeatedly copied by the various medical providers. But claimant testified that she repeatedly told the separate individual providers that her leg gave out due to pain from her back. Nonetheless, all the medical records contain similar versions of a fall and roll down an embankment without mention of back pain or the leg giving out due to back pain.

In this case the credibility of claimant and her daughter is especially important. Here, the ALJ had the opportunity to personally observe the claimant and her daughter testify in person. And the ALJ specifically determined that she believed their testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because she was able to personally observe the demeanor of the witnesses. Although it is difficult to explain the variance between the history of injury contained in the medical records and claimant as well as her daughter's testimony, this Board Member finds by the barest of margins that claimant has met her burden of proof to establish that her fall and injury to her knee were the natural and probable consequence of the underlying back injury suffered in this docketed claim. Consequently, the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 10, 2009, is affirmed.

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁵ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2008 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this 28th day of August 2009.

DAVID A. SHUFELT
BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge